SUBJECT INDEX

	Page
Petition for Rehearing	1
Conclusion	12

INDEX TO APPENDICES

Appendix A. Letter to Office of the Clerk United States Court of Appeals, Dated August 8, 1974 ..... App. p. 1

Appendix B. Letter to Office of the Clerk United States District Court, Dated August 8, 1974 3

TABLE OF AUTHORITIES CITED

Cases	Page
Bollenbach v. United States, 326 U.S.607	4
Chapman v. California, 386 U.S.18	4
Cole v. Arkansas, 333 U.S.196	4
DeJonge v. Oregon, 299 U.S.353	4, 6
Elkins v. United States, 364 U.S.206	11
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S.6	4
Grunewald v. United States, 353 U.S.391	12
Hamling v. United States, No. 73-507	1, 2, 3 ..... 5, 6, 8, 10, 11
J-R Distributors, Inc. v. Washington, No. 73-937	6, 9
Kotteakos v. United States, 328 U.S.750	4
Little v. United States, 73 F.2d 861 (10 Cir. 1934)	4
Marshall v. United States, 360 U.S.310	11, 12
McCarthy v. United States, 394 U.S.459	12
McNabb v. United States, 318 U.S.332	11
New York Times Co. v. Sullivan, 376 U.S.254	4
Offutt v. United States, 348 U.S.11	12
Rabe v. Washington, 405 U.S.313	4, 6
Saldana v. United States, 365 U.S.646	11
Samuel v. United States, 169 F.2d 787 (9 Cir. 1948)	4
Trinkler v. Alabama, No. 73-844	10
Yates v. United States, 356 U.S.363	12
United States v. Russell, 369 U.S.749	6

Page

Wilson v. United States, 250 F.2d 312 (9 Cir. 1958) 4

Yates v. United States, 354 U.S.298 4

Rules

Rules of Court, Rule 19(b) 7

Rules of Court, Rule 21 8

Rules of Court, Rule 23(4) 9

Statutes

United States Code, Title 18, Sec. 1461 .....7, 10

United States Code, Title 18, Sec. 1462 .....7, 10, 11

Textbook

Boskey & Gressman, "The 1970 Changes in the Supreme Court Rules" (July, 1970), 49 F.R.D., pp. 682-683 9

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1075

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING.

Petitioner Michael G. Thevis respectfully presents this petition for a rehearing and prays the Court for an order vacating its denial of the petition for writ of certiorari entered on July 25, 1974, and granting the petition. The petition for rehearing is confined to substantial grounds available to petitioner, although not previously presented, and to intervening circumstances of substantial and controlling effect.

1. In *Hamling v. United States*, No. 73-507, the majority opinion acknowledged that the instructions by the district court with respect to the community standards of the "country as a whole" delineated a wider geographic area than would be warranted by the decisions of the Court in *Miller* and *12 200-Ft. Reels of*

Film and the new standard enunciated in *Hamling* itself. In short, the Court held that one of the criteria for judging obscenity was "local community standards". In *Hamling*, the Court acknowledged that error had occurred, but that petitioners in *Hamling* were not "materially prejudiced" by the district court's failure to give appropriate instructions (Slip Op. 17). The majority opinion concluded, upon an examination of the particular record, that failure to give the correct instructions would not have "materially affected" the deliberations of the jury. Such a conclusion, it is submitted, cannot be reached on the record here.

The trier of the facts in the case herein was a judge of the district court, the Honorable Joe J. Fisher, a jury trial having been waived. The memorandum opinion and order adjudging petitioner guilty (Petition for cert., Appendix B) specifically stated: "Since the evidence in our case does not involve obtrusive dissemination or an environment in which the material is likely to fall into the hands of juveniles, and the magazines in question were not pandered, in following the decisions based on *Redrup*, we might be expected to find the Defendants not constitutionally guilty of interstate transportation of obscene material." (App. B, p. 24). The government never contended that the material here could be described as "hard core pornography", and the trial judge made no such finding.

The Honorable Joe J. Fisher, aforesaid, was a visiting judge from the United States District Court, Eastern District of Texas. Whatever the said district judge may have known with respect to the "local community standards" of Beaumont, Texas, there is nothing in the record here to indicate that the said judge was at all familiar with or had any knowledge of the local

community standards of Jacksonville, Florida, where the trial took place. Moreover, the case herein was tried from beginning to end on only one theory, and that is that the publications here involved violated solely the national standards. Judge Fisher was meticulous in his memorandum opinion (Petition for cert., App. B, pp. 15-26) in emphasizing that he was following the standards and criteria prescribed in *Roth, Memoirs* and *Jacobellis.*

There are twelve different magazines involved in the case herein (Petition for cert., App. A, p. 13). The trial judge found all twelve publications to be obscene. The Court of Appeals below, purporting to give petitioner the benefits of both the *Memoirs* and *Miller* standards, decided that six of the magazines were not obscene. Thus, the trial judge had found all the magazines to be obscene without at any time having ever considered whether such publications offended local community standards and, indeed, without any evidence in the record to indicate that the publications did violate such standards. On the other hand, the Court of Appeals found six of the magazines to be constitutionally protected and six others to be obscene because they offended local community standards, although the trial court had not so held and there was no evidence in the record to support such a finding.

The criterion of "local community standards" in federal obscenity prosecutions was first definitively enunciated by this Court in *Hamling*. The trial judge in the case herein was unaware of such a standard, the case having been tried in 1971. Since the case was tried only on the theory of national standards, and since the record was barren of any evidence of local community standards and the trial judge, on the record, was not

familiar with such standards, it is plain that the error committed in the case herein cannot be said to have been without material effect upon the result. Not only was the case confined to "national standards", but the petitioner was neither charged with violation of local standards nor was petitioner ever given the opportunity to prepare and present evidence of the local standards to the trier of the facts, a visiting judge from another State.

It is submitted that the petitioner has been deprived of his liberty without due process of law. He has been convicted on a charge never made and on a theory never tried. His judgment of conviction has been affirmed by an appellate court substituting itself for the trier of the facts, reweighing the evidence, and deciding a critical issue which was never submitted to the trier of facts. On this record, the judgment of conviction cannot be supported in the light of salient decisions of this Court. *Rabe v. Washington,* 405 U.S. 313; *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196; *Bollenbach v. United States,* 326 U.S. 607, 613; *Yates v. United States,* 354 U.S.298, 327; *Wilson v. United States,* 250 F.2d 312, 325 (9 Cir. 1958); *Samuel v. United States,* 169 F.2d 787, 792 (9 Cir. 1948); *Little v. United States,* 73 F.2d 861, 866-867 (10 Cir. 1934). See also, *New York Times Co. v. Sullivan,* 376 U.S.254, 284; *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S.6, 11; *Chapman v. California,* 386 U.S.18, 22-24; *Kotteakos v. United States,* 328 U.S.750, 776.

2. As heretofore stated, it was in *Hamling* that this Court for the first time definitively enunciated a criterion of "local community standards" for federal obscenity prosecutions. The indictment in the case

herein was returned on May 14, 1970, in the United States District Court for the Middle District of Florida. If, as was stated in *Hamling*, an indictment which charges the dissemination of "obscene" material "is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him" (Slip Op. 27-28), then the only meaning of the term as used in the indictment herein was that the publications named in the indictment exceeded national community standards. It was so understood by the government; it was so understood by the trial judge.

If, as stated by the majority opinion in *Hamling* and by the Court of Appeals here, petitioner is entitled to all the benefits of *Miller*, if due process and *ex post facto* infirmities are to be avoided, it is submitted that the indictment here is constitutionally invalid since petitioner was never advised that the publications exceeded the contemporary standards of Jacksonville, Florida. The sufficiency of the indictment here is as much in question as the sufficiency of the indictment in *Orito*, which led to remand by this Court. The judgment of conviction rests upon a palpably invalid indictment. Neither the Grand Jury which returned the indictment, nor the indictment itself, nor the judge who returned guilt upon the basis of the indictment, ever apprised petitioner that the material was charged with violating the local standards of Jacksonville, Florida, nor could petitioner expect that the judgment of conviction would be affirmed, based upon local community standards which were unknown to either the trial judge or to the appellate court on the record presented.

Petitioner has been denied the rudimentary rights of due process, the right to be apprised of the nature and cause of the accusations made against him and the

right to a fair trial. Petitioner submits that on this record there is a substantial federal question presented in the light of the ruling of the Court in *Hamling* and *Jenkins* with respect to the rejection of "national standards" and the substitution of "local community standards", as such new standard enunciated on June 24, 1974, affects the judgment of conviction herein. See, *Rabe v. Washington,* 405 U.S.313; *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196; *United States v. Russell,* 369 U.S.749.

3. Three Justices of this Court (and assumedly a fourth Justice would agree) have stated that the denial of certiorari in the case herein was improper and that the Court has "failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins.* At a minimum, the Court should vacate the judgments below and remand for such a review". Mr. Justice White in *J-R Distributors, Inc. v. Washington,* No. 73-937, has stated his disagreement with the aforesaid Justices. The inclusion of the case herein within the scope of Justice White's disagreement overlooks the particular record here and the application of the Rules of the Court to this case in the light of their history, it is respectfully submitted.

The petition for certiorari was filed in this case on January 8, 1974. The petition for a writ of certiorari in *Hamling* was granted on January 14, 1974 (94 S.Ct. 893). The questions presented in *Hamling* were four-

teen in number and they included, among other things, not only the constitutional questions relative to the validity of 18 U.S.C. §1461, on its face and as applied to conduct committed prior to *Miller*, but also as to whether the material involved was or was not obscene and whether the material was entitled to constitutional protection. Assumedly, this Court deemed all the questions subtantial when certiorari was granted. See Rule 19(b) of the Rules of the Court.

The petition for writ of certiorari which was filed in this case one week before the grant of the petition in *Hamling* contained, among other things, the same or similar fundamental constitutional issues with respect to 18 U.S.C. §1462, and again the petition specifically presented the question as to whether the publications named in the indictment were or were not obscene and were entitled to constitutional protection. See Petition for Writ of Certiorari, page 4, Questions 5 and 6. The government never disputed the substantiality of the questions directly. Indeed, the government initially made no response to the petition until specifically requested to do so by the Clerk of this Court.[1] When the government finally filed its memorandum in opposition to the grant of the petition, it contented itself with reliance upon the brief which had been filed in *Hamling*, together with the argument which had already taken place in *Hamling*. The government concluded its brief memorandum in opposition by asserting that "Since these issues are presently pending in *Hamling*, however, we suggest that the Court should defer action

[1]The letter of April 18, 1974, from the Clerk to the Solicitor General stated that the "Court has directed this office to request that a response be filed in these cases." A copy of the letter was sent to counsel for petitioner, but there was no request by the Court for certification of the publications.

on these petitions until *Hamling* is decided" (Memorandum for the United States, p. 7).

In short, the issue of whether the publications involved were or were not obscene and entitled to constitutional protection was specifically presented to this Court at a time and under circumstances where petitioner was justified in believing, it is submitted, that the substantial questions would lead to the grant of certiorari as in *Hamling*. Plainly, with the grant of certiorari, the record, together with all the exhibits, would have been certified as has been the case since 1970, when the Rules were changed. That the Court decided to follow the government's suggestion, and await disposition of this case until the decision in *Hamling*, did not fairly apprise petitioner under the above circumstances that he would be deprived of the Court's independent constitutional judgment with respect to the material, merely because the publications had not been certified to the Court, when the Court itself had never called for the publications.

Rule 21 of the Rules of the Court was amended in 1970 to eliminate the need to file records with respect to the Court's determination as to whether a case was to be reviewed on the merits. The filing of the record had become a useless formality, and with rare exception the records which had been filed had not in fact been used by the Court at the time when certiorari was sought. The records had "largely lain dormant and unused in connection with the preliminary consideration of the case to determine whether it shall be reviewed; the storage space of the Clerk's office has been filled to overflowing with these records, and time and expense have been necessitated in order to repackage and

return the records to the lower courts following Supreme Court action". Boskey & Gressman, "The 1970 Changes in the Supreme Court Rules", 49 F.R.D. 682-683 (July, 1970). The revised Rule indicates that the Court has expressly reserved a right to request, through its Clerk, that all or any part of the record be certified and transmitted to the Court prior to action on a petition for certiorari.

In the light of all the aforesaid, it is submitted that petitioner is justified in requesting the Court to grant the independent constitutional judgment which *Jenkins* assured all accused in obscenity prosecutions. Mr. Justice White referred to Rule 23(4) in *J-R Distributors, Inc.*, but the petition for certiorari herein presents with accuracy, brevity and clearness whatever is essential to a ready understanding of the point with respect to the obscenity or nonobscenity of the material. See Petition for Certiorari, pages 38-41.

It should be noted that the trial judge in this case and the appellate court differed with respect to the constitutional protection to be afforded to the twelve publications here involved, and since the responsibility of this Court to review the material was not made clear until *Jenkins*, there is added reason for consideration by this Court.

While it has been assumed since 1970 that the Court would itself call for any portion of the record on a petition for certiorari if it so desired, petitioner has responded to the suggestion of Mr. Justice White that this burden be assumed by counsel and has formally requested both the Clerk of the Court of Appeals for the Fifth Circuit and the Clerk of the United States District Court, Middle District of Florida, to certify

the twelve publications involved herein. Copies of the letters are attached hereto as Appendices A and B.[2]

Finally, petitioner respectfully submits that the publications herein involved are not substantially different in the constitutional sense from those involved in *Trinkler v. Alabama*, No. 73-844, where this Court on July 25, 1974, granted certiorari and vacated and remanded for reconsideration in the light of *Hamling* and *Jenkins*.

4. The petitioner argued here that prior to the Court's decision in *Miller*, 18 U.S.C. §1462 did not contain in its language, nor had it been construed to apply to, the specific types of sexual conduct referred to in *Miller*, and therefore the section was unconstitutionally vague as applied to petitioner in the prosecution herein. The construction of the statute in *Hamling* was necessarily the first definitive construction of a federal obscenity statute to include the specific sexual conduct given as examples in *Miller*. Such a construction, of course, could only be prospective. However, with respect to the lack of a previous limiting construction, this Court stated that the petitioners in *Hamling* lacked the standing to raise the question. It was stated in *Hamling:* "Whatever complaint the distributor of material which presented a more difficult question of obscenity *vel non* might have as to the lack of a previous limiting construction of 18 U.S.C. §1461, these petitioners have none." (Slip Op. 25). The record herein is substantially different. There has been a finding that pandering and obtrusive dissemination are not involved in this case. The court below has found six of the publications to be entitled to constitutional protec-

[2]Letters have been written to the clerks of both courts because of the uncertainty of where the publications may be located at this time.

tion. There is a substantial question as to whether or not any of the publications are obscene and whether they are not, in fact, entitled to constitutional protection as a matter of law. Petitioner, therefore, does have the standing to raise the question, and it is submitted that the question of whether or not this Court has ever given a limiting construction to 18 U.S.C. §1462 prior to *Hamling* is a question of substantial importance.

5. In the above discussion, petitioner has not retraced the constitutional and legal arguments contained in the petition for certiorari. Petitioner is presenting, in essence, a substantial ground for rehearing available to petitioner, although not previously presented. That ground is bottomed upon the fundamental proposition that the aforementioned considerations outlined in the petition for rehearing herein justify a grant of the petition under this Court's responsibility to supervise the administration of criminal justice by the federal judiciary. The petition herein invokes this supervisory jurisdiction. The scope of this Court's reviewing power over convictions brought from the federal courts is not confined to ascertainment of constitutional validity. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States,* 318 U.S. 332, 340-341.

See also, *Saldana v. United States,* 365 U.S.646, 647 (sentence "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts"); *Elkins v. United States,* 364 U.S.206, 216 (silver platter doctrine abandoned upon invocation of "the Court's supervisory power over the administration of criminal justice in the federal courts"); *Marshall v. United States,* 360 U.S.

310, 313 (exposure of jurors during trial to newspaper articles entitles accused to a new trial "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts"); *Yates v. United States,* 356 U.S.363, 366-367 (sentence of district court in contempt action set aside in the exercise of the Supreme Court's "supervisory power over the administration of justice in the lower federal courts"); *Grunewald v. United States,* 353 U.S.391, 423-424 (danger that jury might make impermissible use of an alleged prior inconsistent statement admitted into evidence on the question of credibility justifies grant of a new trial under "our supervisory power over the administration of federal criminal justice"); *McCarthy v. United States,* 394 U.S.459, 464 (failure by the district judge to comply with F.R.Cr.P., Rule 11, results in reversal and remand "pursuant to our supervisory power over the lower federal courts"); *Offutt v. United States,* 348 U.S.11, 14 ("Therefore, justice must satisfy the appearance of justice.").

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner
Michael G. Thevis.

SAM ROSENWEIN,
Of Counsel.

Attorney's Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for petitioner Michael G. Thevis, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,
Attorney for Petitioner
Michael G. Thevis.

APPENDIX A.

Law Offices
Fleishman, McDaniel, Brown & Weston
A Professional Corporation
6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

August 8, 1974

Office of the Clerk
United States Court of Appeals
Fifth Circuit
400 Royal Street, Room 408
New Orleans, Louisiana 70130

Re: United States v. Thevis, et al.
No. 71-2614

Dear Sir:

The petitioner, Michael G. Thevis, has filed a petition for rehearing in the Supreme Court of the United States, seeking an order vacating the Supreme Court's denial of a petition for a writ of certiorari entered on July 25, 1974. The petition for rehearing is pending and is on the calendar of the Court.

The petitioner accordingly requests that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, each of the following publications which appear as government exhibits in the record.

As named in the indictment:

Count 1—"Duo"
Count 2—"Boys and Their Male Lovers"
Count 3—"Domino" Vol. 1, No. 1

Count 4—"Love Knot"
Count 5—"Wanton"
Count 6—"My Boys" Vol. 1, No. 1
Count 7—"In and its Nice"
Count 8—"The Girlfriends" Vol. 2, No. 2
Count 9—"Pussy Willow"
Count 10—"Arcadia" Vol. 6, No. 2
Count 11—"Teenage Jaybird"
Count 12—"Cloud 9" Vol. 6, No. 3.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON

/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Petitioner
Michael G. Thevis

SF/a

cc: Robert H. Bork,
Solicitor General
Robert Eugene Smith, Esq.

APPENDIX B.

Law Offices
Fleishman, McDaniel, Brown & Weston
A Professional Corporation
6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

August 8, 1974

Office of the Clerk
United States District Court
Middle District of Florida
Jacksonville, Florida 32201

Re: United States v. Thevis, et al.
No. 70-72-CR-J

Dear Sir:

The petitioner, Michael G. Thevis, has filed a petition for rehearing in the Supreme Court of the United States, seeking an order vacating the Supreme Court's denial of a petition for a writ of certiorari entered on July 25, 1974. The petition for rehearing is pending and is on the calendar of the Court.

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Count 9—"Pussy Willow"
Count 10—"Arcadia" Vol. 6, No. 2
Count 11—"Teenage Jaybird"
Count 12—"Cloud 9" Vol. 6, No. 3.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Petitioner
Michael G. Thevis

SF/a

cc: Robert H. Bork,
Solicitor General
Robert Eugene Smith, Esq.